No. 15-109

In the Supreme Court of the United States

JERMAINE SIMMONS, ET AL., PETITIONERS

v.

WALTER J. HIMMELREICH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented is:

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners are Jermaine Simmons and Brian Butts.

Respondent is Walter J. Himmelreich.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App 1a-10a) is reported at 766 F.3d 576. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2014. A petition for rehearing en banc was denied on March 10, 2015 (Pet. App. 11a-12a). On May 22, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 23, 2015, and the petition was filed on that date. The petition was granted on November 6, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

This case involves the proper interpretation of the Federal Tort Claims Act (FTCA) judgment bar, 28 U.S.C. 2676. That provision states that "the judgment" in an FTCA action "shall constitute a complete bar" to "any action" by the same plaintiff against the government employee allegedly responsible for the tort. *Ibid.* Respondent's prior FTCA action against the United States was dismissed in a final judgment pursuant to 28 U.S.C. 2680(a), which exempts the United States from liability for claims involving certain discretionary governmental functions. Pet. App. 47a-56a. In this case, the district court relied on the judgment bar to dismiss respondent's Eighth Amendment *Bivens* claim against petitioners. *Id.* at 20a-22a. The court of appeals reversed, concluding that the judgment bar's reference to "judgment" does not encompass FTCA judgments of dismissal pursuant to Section 2680. *Id.* at 5a-8a.

A. The Legal Background

The FTCA waives the United States' sovereign immunity for claims for money damages arising out of torts committed by federal employees. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). Before the FTCA became law, parties injured by federal employees were forced to seek relief through private bills in Congress or by suing the employee in his individual capacity. See *Dalehite* v. *United States*, 346 U.S. 15, 24-25 & n.9 (1953); see also *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954). Such individual-capacity suits constituted "a very real attack upon the morale of the services," because most government employees were "not in a position to stand or defend large damage suits." *Gilman*, 347

U.S. at 512 n.2 (quoting *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 9 (1942) (statement of Assistant Attorney General Francis M. Shea) (*1942 Hearing*)). The suits also imposed a significant burden on government resources, because "the Government, through the Department of Justice, [wa]s constantly being called on * * * to go in and defend" federal employees from suit. *Ibid.*

In 1946, Congress enacted the FTCA out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24-25. In the FTCA, Congress "waived sovereign immunity from suit for certain specified torts of federal employees." *Id.* at 17. At the same time, however, Congress placed limits on the United States' waiver of its immunity, as well as on the scope of the United States' substantive liability. The FTCA therefore does "not assure injured persons damages for all injuries caused by such employees." *Ibid.*

1. Section 1346(b) is the FTCA's jurisdictional provision. It waives the United States' sovereign immunity by granting the district courts "exclusive jurisdiction" over certain classes of tort claims against the United States. 28 U.S.C. 1346(b)(1). Specifically, Section 1346(b) provides that

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within

> the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Ibid.

2. Chapter 171 of Title 28 of the United States Code contains various procedural and liability provisions of the FTCA. Within that chapter, Section 2674 sets forth the "Liability of United States." 28 U.S.C. 2674. Subject to certain qualifications, it states that "[t]he United States shall be liable" for tort claims "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." *Ibid.*

Section 2680 of Chapter 171 enumerates several exceptions to the jurisdiction and liability provisions of the FTCA. Section 2680 states that "[t]he provisions of [Chapter 171]" and of "section 1346(b)" "shall not apply" to the categories of claims set forth in its list of exceptions. One such category encompasses any claim based upon a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a).

This Court has repeatedly recognized that Section 2680's exceptions establish "substantive limitations" on the United States' FTCA liability. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955); see, *e.g.*, *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013); pp. 34-35, *infra* (discussing cases). At the same time, however, those exceptions also limit the FTCA's waiver of sovereign immunity and thus limit the subject-matter jurisdiction of district courts. See 28 U.S.C.

2680 (noting that Section 1346(b)'s jurisdictional grant "shall not apply" to claims based on the exceptions); *Dalehite*, 346 U.S. at 24, 31 & n.25 (treating Section 2680 exceptions as limits on "jurisdiction").[1]

3. This case turns on the meaning and application of the FTCA judgment bar, 28 U.S.C. 2676. That provision states that

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Ibid. Once an FTCA action is the subject of a judgment, the judgment bar cuts off the claimant's ability to pursue other avenues of relief, based on the same underlying facts, against government employees.

The judgment bar plays an important role in the FTCA's remedial scheme. The FTCA grants plaintiffs the right to sue a financially responsible defendant, subject to the limits and exceptions Congress placed on the government's liability. But by enacting the judgment bar, Congress also ensured that, if a claimant chose to pursue an FTCA action against the United States, the judgment in that suit would both protect federal employees against the threat and distrac-

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[1] See also, *e.g.*, *Domme* v. *United States*, 61 F.3d 787, 789 (10th Cir. 1995); *Richardson* v. *United States*, 943 F.2d 1107, 1113 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Sowell* v. *United States*, 835 F.2d 1133, 1135 (5th Cir. 1988); *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822, 823 (2d Cir. 1985); Br. in Opp. 35 (agreeing that Section 2680 exceptions are "jurisdictional in nature"); but see *Williams* v. *Fleming*, 597 F.3d 820, 823-824 (7th Cir. 2010); see generally 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 7.01[2], at 7-7 (2013).

tion of litigation and relieve the government from the burden of defending multiple actions arising out of the same incident. This Court has thus described the judgment bar's core purpose as being "to save trouble for the Government and its employees" by "avoiding duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Will* v. *Hallock*, 546 U.S. 345, 353-354 (2006) (quoting 18C Charles Alan Wright et al., *Federal Practice and Procedure* § 4402, at 9 (2d ed. 2002) (*Federal Practice & Procedure*)).

4. At the time Congress enacted the FTCA, the judgment bar's main function was to bar state-law tort claims filed against federal employees in state court. In 1971, this Court decided *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which recognized a limited constitutional tort cause of action against federal officers and employees in their personal capacity. *Id.* at 395-397. It is well established that the judgment bar can foreclose a subsequent *Bivens* action based on the same underlying facts.[2]

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[2] See 28 U.S.C. 2676 (stating that prior judgment bars "*any* action by the claimant" arising out of the same subject matter) (emphasis added); see also, *e.g.*, *Unus* v. *Kane*, 565 F.3d 103, 121-122 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010); *Farmer* v. *Perrill*, 275 F.3d 958, 963-965 (10th Cir. 2001); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437-1438 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra* v. *Pichardo*, 786 F.2d 237, 241-242 (6th Cir.), cert. denied, 479 U.S. 826 (1986); see *Hallock* v. *Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), vacated by *sub nom. Will* v. *Hallock*, 546 U.S. 345 (2006).

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act. That statute makes the FTCA the "exclusive" remedy for any injury arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 2679(b)(1). The Westfall Act expressly "preclude[s]" state-tort claims against federal employees in their individual capacity arising from such injuries, *ibid.*, and it provides for the prompt substitution of the United States as the defendant in the employee's place on such claims, 28 U.S.C. 2679(d)(1). The Act's exclusive-remedy provisions do not apply, however, to civil actions brought against such employees for violations of the Constitution (*i.e.*, *Bivens* claims) or other federal statutes apart from the FTCA. See 28 U.S.C. 2679(b)(2). In light of the Westfall Act's restrictions on state-tort suits directly against federal employees, the judgment bar now primarily functions as a bar to *Bivens* actions.

B. The Present Controversy

Respondent is a federal inmate at the Federal Correctional Institution (FCI) in Danbury, Connecticut. He is serving a 240-month sentence for production of child pornography, in violation of 18 U.S.C. 2251(b). J.A. 105; Pet. C.A. Br. 2. Respondent asserts that in October 2008, while serving his sentence at the FCI in Elkton, Ohio, he was assaulted by another inmate at the prison. J.A. 49-51. Respondent alleges that petitioners, who are staff members at FCI Elkton, were on notice that the other inmate intended to attack him, and that they nonetheless placed him in the general

prison population where he would be exposed to the attack. Pet. App. 34a, 48a.

1. In February 2010, respondent filed an FTCA action against the United States, based on the 2008 assault, in federal district court. J.A. 67, 91-101. In October 2010, he filed this case as a separate *Bivens* action against petitioners (along with various other defendants who are not parties in this case). J.A. 7. Respondent alleged (among other things) that petitioners' actions in connection with the assault violated the Eighth Amendment. J.A. 58.

The United States moved to dismiss the FTCA action, with prejudice, pursuant to the FTCA's discretionary-function exception, 28 U.S.C. 2680(a). J.A. 102-116. In November 2010, the district court dismissed that action. Pet. App 47a-54a. The court explained that decisions by prison officials regarding inmate safety generally involve the exercise of judgment. *Id.* at 49a-50a. It noted that respondent had not alleged that petitioners were aware of any threats directed specifically at him, and it emphasized that petitioners had made a "policy decision" to house respondent in the general population based on the absence of any specific threat against him. *Id.* at 52a-53a. The court also explained that Section 2680(a) is an exception to the FTCA's general waiver of sovereign immunity from tort claims against the United States, and that the court therefore "lacks subject matter jurisdiction over acts falling within the discretionary function exception." *Id.* at 49a. On November 18, 2010, the court formally issued a document—entitled "JUDGMENT ENTRY"—declaring that it was "ORDERED, ADJUDGED and

DECREED" that the case was dismissed. *Id.* at 55a-56a.[3]

2. In March 2011, the district court dismissed respondent's separate *Bivens* suit under 28 U.S.C. 1915(e) for failure to state a claim. Pet. App. 34a-46a. In May 2012, the court of appeals remanded respondent's Eighth Amendment claim, which alleged that the individual defendants had failed to protect respondent from the inmate-on-inmate assault. *Id.* at 29a-31a.[4]

On remand, the district court granted the government's motion for summary judgment on the Eighth Amendment claim on two alternative grounds: (1) respondent's failure to exhaust his administrative remedies within the prison grievance process, and (2) the judgment bar. Pet. App. 18a-22a. As to the latter, the court explained that the judgment bar "applies to all judgments" in FTCA actions, including those dismissing a case "because the actions in controversy f[a]ll under the discretionary exception to the FTCA

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[3] Respondent subsequently filed a motion asking the district court to alter or amend the judgment and to reconsider the dismissal of his FTCA claim. J.A. 133-139. The court denied that motion, and respondent's subsequent appeal was eventually dismissed by the court of appeals for failure to prosecute. J.A. 78; Pet. App. 57a-58a. In July 2012, respondent filed a motion asking the district court to recall the judgment. J.A. 142-147. The court denied that motion, Pet. App. 59a-61a, and the court of appeals affirmed, *id.* at 62a-64a.

[4] The court of appeals also remanded a *Bivens* claim that respondent had brought under the First Amendment. Pet. App. 27a-28a. Respondent's First Amendment claim remains pending in the district court, and it is not at issue here. See *id.* at 17a-18a (subsequent district court opinion dismissing First Amendment claim for failure to exhaust administrative remedies); see also *id.* at 2a-5a (vacating dismissal of First Amendment claim and remanding to district court).

[*i.e.*, 28 U.S.C. 2680(a)]." Pet. App. 21a (citing *Harris* v. *United States*, 422 F.3d 322, 336 (6th Cir. 2005)). The court noted that respondent's Eighth Amendment claim "arises out of the very same occurrence [as the prior FTCA suit]; the assault in 2008, and the same actions; the prison's alleged failure to protect." *Ibid.*

3. The court of appeals vacated the dismissal of respondent's Eighth Amendment *Bivens* claim. Pet. App. 1a-10a. The court first excused respondent's failure to exhaust administrative remedies based on his allegation—which the court assumed to be true—that prison officials had threatened him with retaliation if he pursued the prison grievance process. *Id.* at 3a-5a. That aspect of the court's ruling is not at issue here.

The court of appeals then held that the FTCA judgment bar does not foreclose respondent's Eighth Amendment claim. Pet. App. 6a-10a. The court observed that Section 2680(a) operates as a limitation on the district court's jurisdiction over FTCA cases, and that the district court's dismissal of respondent's FTCA claim under Section 2680(a) was therefore a dismissal for lack of subject-matter jurisdiction. *Id.* at 6a, 9a. The court held that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the [Section] 2676 judgment bar," reasoning that, "in the absence of jurisdiction, the court lacks the power to enter judgment." *Id.* at 6a. The court also invoked the "general rule" of *res judicata* that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." *Id.* at 9a.

4. The court of appeals subsequently denied petitioners' petition for rehearing en banc. Pet. App. 11a-12a.

SUMMARY OF ARGUMENT

There is no dispute that respondent's prior FTCA case was terminated by the district court's entry of a "JUDGMENT" on behalf of the United States based on 28 U.S.C. 2680(a). Pet. App. 55a. That district court judgment unambiguously qualifies as a "judgment" for purposes of the FTCA's judgment bar, 28 U.S.C. 2676. It therefore also precludes respondent from bringing this separate *Bivens* claim based on the same underlying facts. The court of appeals erred in concluding otherwise, and its decision should be reversed.

I. The judgment bar states that "[t]he judgment in an action under section 1346(b)"—*i.e.*, in an FTCA action against the United States—"shall constitute a complete bar to any action" against the government employee based on the same subject matter. 28 U.S.C. 2676. That language plainly encompasses the judgment dismissing respondent's FTCA action under Section 2680(a).

At the time Congress enacted the FTCA in 1946, standard dictionaries defined "judgment" to include any final "determination [or] decision * * * of a court," *Webster's New International Dictionary* 1343 (2d ed. 1944) (*Webster's*); see, *e.g.*, *Bouvier's Law Dictionary* 606 (1934) (*Bouvier's*). That common understanding of the term was also reflected in Federal Rule of Civil Procedure 54(a) (1946), which defined "judgment" as including "any order from which an appeal lies." Congress ratified that understanding by expressly applying the federal rules to FTCA cases. FTCA, ch. 753, Tit. IV, § 411, 60 Stat. 844. Congress also used the term "judgment" elsewhere in the FTCA—most notably in the provision authorizing

appeals of "[f]inal judgments" in FTCA cases—in a way that plainly encompassed judgments of dismissal under Section 2680. § 412(a), 60 Stat. 844-845.

The purpose of the judgment bar confirms its application to Section 2680 dismissals. The judgment bar is intended to "save trouble for the Government and its employees" by "avoiding duplicative litigation, multiple suits on identical entitlements or obligations between the same parties." *Will* v. *Hallock*, 546 U.S. 345, 353-354 (2006) (citation and internal quotation marks omitted). Congress wanted to prevent unsuccessful FTCA plaintiffs from "turn[ing] around" and "su[ing]" the employee whose alleged misconduct was at issue, thereby initiating another disruptive round of litigation. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting *1942 Hearing* 9). That policy rationale applies—with full force—to FTCA cases dismissed under Section 2680. Just as in other FTCA cases, litigation over Section 2680 can require voluminous discovery, extensive motions practice, sometimes a full trial, and often an appeal. Congress did not want to allow multiple rounds of burdensome litigation over the same underlying claim.

Respondent and the court of appeals deny that the plain meaning of "judgment" applies in this context. Pet. App. 5a-8a; Br. in Opp. 33-35. In respondent's view (Br. in Opp. 33), the judgment bar applies only to a subset of judgments "capable of having some preclusive effect" under common-law principles of *res judicata*. That approach lacks any basis in the text—or context—of the judgment bar. As the Restatement (First) of Judgments and other leading authorities of the time make clear, the term "judgment" bore its ordinary meaning even in the *res judicata* context.

There was (and is) no specialized definition of "judgment" confining its scope to judgments "capable of having some preclusive effect" (*ibid.*).

In any event, a judgment of dismissal under Section 2680 qualifies as a "judgment" even under respondent's own theory. Section 2680 imposes "substantive limitations" on the FTCA liability of the United States, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955), and thus a judgment dismissing and FTCA claim under Section 2680 is "on the merits" for purposes of the doctrine of claim preclusion. Claim preclusion is also appropriate because Section 2680 reflects a determination by Congress that the United States is not liable to the plaintiff, such that the plaintiff's claim must fail in any federal court. See *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947). The fact that a Section 2680 judgment is technically for lack of jurisdiction makes no difference. See *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-81 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986). Furthermore, and at a minimum, a Section 2680 dismissal has preclusive effect under the related doctrine of issue preclusion.

Thus under either claim preclusion or issue preclusion, a Section 2680 dismissal forecloses the plaintiff's ability to bring a subsequent FTCA action against the United States. To the extent respondent is right (Br. in Opp. 33-34) that the judgment bar's purpose is to extend to federal employees the benefits of *res judicata*, the bar applies to judgments based on Section 2680.

II. Respondent has indicated that he will advance two new arguments in defense of the judgment below. Each of those arguments is inconsistent with the FTCA's text and this Court's precedent.

First, respondent asserts that the judgment bar's reference to an action "under" Section 1346(b) actually means an action "*properly* brought" under that provision. Br. in Opp. 34 (citations omitted). On that view, an FTCA action that is dismissed pursuant to Section 2680 was not "an action under section 1346(b)" in the first place. But that interpretation both rewrites the statute and directly conflicts with this Court's interpretation of other FTCA provisions in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), and *United States* v. *Smith*, 499 U.S. 160 (1991). As those decisions make clear, the judgment bar's reference to "an action under section 1346(b)" covers any action in which the plaintiff invokes Section 1346(b) as the basis for jurisdiction—which is to say, any FTCA action.

Second, respondent argues (Br. in Opp. 28-31) that Section 2680 itself prevents Section 2680 dismissals from triggering the judgment bar. That contention relies upon Section 2680's introductory language stating that "[t]he provisions of [Chapter 171 of Title 28 of the United States Code]"—including the judgment bar—"shall not apply to" any of the types of claims set forth in Section 2680. Respondent's argument is again foreclosed by *Smith*. There, the Court held that Section 2679(b)'s exclusive-remedy provision—which is also included in Chapter 171—applies to the claims identified in Section 2680. 499 U.S. at 161-162, 165-167. *Smith*'s holding is incompatible with respondent's argument that Section 2680 renders the enumer-

ated claims exempt from all of "[t]he provisions of this chapter."

ARGUMENT

The dismissal of plaintiff's FTCA claim under Section 2680 triggered the FTCA's judgment bar and forecloses plaintiff's subsequent *Bivens* action. The text of the judgment bar provides that "[t]he judgment in an action under section 1346(b) of [Title 28 of the United States Code] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. By its terms, the judgment bar contains three elements that must be satisfied in order to foreclose a suit against a federal employee: (1) there must be a prior "judgment"; (2) that "judgment" must have come in "an action under section 1346(b)"; and (3) that action must have involved "the same subject matter" as the present suit.

The parties appear to agree that the third requirement is satisfied here. As the district court recognized—and as respondent's own filings below make clear—his separate FTCA and *Bivens* suits turn on the same core allegation that petitioners tortiously failed to protect him from an assault by a fellow inmate. Pet. App. 21a; J.A. 42-43, 45-52, 93-99; see generally *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.) (holding that "same subject matter" test is satisfied so long as "the substance of the *Bivens* claims reveals that they arise from the same actions toward plaintiff by defendants as those that defined the FTCA case"), cert. denied, 479 U.S. 826 (1986).

This case therefore turns on whether the judgment bar's two other requirements are also satisfied. They

undoubtedly are. As explained further below, the district court's dismissal of respondent's FTCA case pursuant to Section 2680(a) constitutes a "judgment" under any reasonable construction of that term. 28 U.S.C. 2676. Respondent's FTCA case was also plainly "an action under section 1346(b)." *Ibid.* The court of appeals erred in denying application of the judgment bar in this case, and its decision should be reversed.

I. THE DISMISSAL OF RESPONDENT'S FTCA CASE PURSUANT TO SECTION 2680 CONSTITUTES A "JUDGMENT" FOR PURPOSES OF THE JUDGMENT BAR

Whether or not a judgment of dismissal under Section 2680 counts as a "judgment" for purposes of the judgment bar presents a question of statutory construction. This Court's general rule is that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (brackets, citation, and internal quotation marks omitted). In construing the FTCA, this Court has emphasized both that it is "bound to operate within the framework of the words chosen by Congress," *Richards* v. *United States*, 369 U.S. 1, 10 (1962), and that "the legislative purpose is expressed by the ordinary meaning of the words used," *Kosak* v. *United States*, 465 U.S. 848, 853 (1984) (citation omitted).

The district court's dismissal of plaintiff's FTCA claims unambiguously qualifies as a "judgment." On November 18, 2010, that court granted the United States' motion to dismiss respondent's FTCA claim pursuant to Section 2680(a)'s discretionary-function

exception. Pet. App. 47a-54a. That same day, the court issued a document entitled "JUDGMENT ENTRY" stating "IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Government's motion to dismiss is GRANTED. The complaint is hereby DISMISSED." *Id.* at 55a.

In every ordinary sense, those actions qualify as the entry of a "judgment" and fall within the plain terms of Section 2676's judgment bar. The district court's order resolved "all the claims and all the parties' rights and liabilities," see Fed. R. Civ. P. 54(b), and the "judgment" was "set out in a separate document," pursuant to Federal Rule of Civil Procedure 58(a). Thus, the judgment was an "order from which an appeal lies" and qualified as a "judgment," as that term is defined in Rule 54(a). Respondent has himself repeatedly acknowledged that the dismissal of his FTCA case constituted a "judgment."[5]

Respondent and the court of appeals deny that straightforward and commonsense conclusion. In their view, the judgment bar's unqualified reference to a "judgment" applies only to a subset of judgments that does not include dismissals of an FTCA claim under Section 2680. According to the court of appeals, "judgment" encompasses only non-jurisdictional judgments. Pet. App. 5a-8a. According to respondent (Br. in Opp. 33), "judgment" includes only those judgments "capable of having some preclusive effect" in subsequent litigation under principles of *res judicata*.

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[5] See, *e.g.*, J.A. 133 (respondent's "Motion to Alter or Amend Judgment"); J.A. 140 (noting same motion); J.A. 142 (respondent's "Motion to Recall Judgment," discussing district court's "Judgment of Dismissal of the Federal Tort Claim").

Both are mistaken. The judgment bar's text, structure, history, and purpose all make clear that the statutory term "judgment" extends to any judgment dismissing an FTCA case pursuant to Section 2680.

A. The Judgment Bar's Text Encompasses Section 2680 Dismissals

This Court has emphasized that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation and internal quotation marks omitted). Respondent's theory impermissibly rewrites the statutory language, adds a new requirement that any "judgment" have preclusive effect, and narrows the scope of the judgment bar.

1. The plain meaning of "judgment" at the time Congress enacted the FTCA encompassed Section 2680 dismissals

Respondent's view that the term "judgment" encompasses only judgments "capable of having some preclusive effect" (Br. in Opp. 33) is at odds with the way that term was understood when Congress enacted the FTCA in 1946. At that time, a "judgment" generally referred to any final adjudication of a case by a court, and it plainly encompassed the dismissal of an FTCA action under Section 2680.

a. In 1946, the ordinary dictionary meaning of the word "judgment"—when used in the context of legal proceedings—was "the determination, decision, decree, or sentence of a court." *Webster's* 1343; see 5 *Oxford English Dictionary* 618 (1933) (defining "judgment" as "[t]he sentence of a court of justice"

and "a judicial decision or order in court"). A judgment of dismissal under Section 2680(a) plainly qualifies as a "judgment" under that standard definition.

Prominent authorities on legal usage endorsed similar definitions of "judgment" that likewise embrace judgments of dismissal under Section 2680. For example, *Bouvier's Law Dictionary* defined "judgment" as either (1) "[t]he conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit," or (2) "[t]he decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury." *Bouvier's* 606.

Black's Law Dictionary contained multiple definitions of the term "judgment." Those included:

- "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination";
- "[t]he conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit";
- "[t]he final determination, by a court of competent jurisdiction, of the rights of the parties in an action or proceeding";
- "[t]he decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury";
- "[t]he sentence of the law pronounced by the court upon the matter appearing from the previous proceedings in the suit"; and

- "[t]he determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such a court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist."

Black's Law Dictionary 1024 (3d ed. 1933).

Each of those standard definitions encompasses the dismissal of an FTCA case under Section 2680, which reflects a district court's final conclusion that (1) the United States is not substantively liable to the claimant under the FTCA, and (2) the court lacks jurisdiction over the case. See pp. 4-5, *supra*; pp. 34-35, *infra*. Moreover, none of the standard definitions incorporates *res judicata* principles or otherwise turns on whether the judgment is "capable of having some preclusive effect." Br. in Opp. 33.

b. Courts applying the FTCA in the decade immediately following its passage confirmed that a Section 2680 dismissal constitutes a "judgment" under the ordinary meaning of that term. Numerous decisions from that period expressly refer to such dismissals as "judgment[s]."[6] The courts' natural—and entirely

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[6] See, *e.g.*, *Morton* v. *United States*, 228 F.2d 431, 432 (D.C. Cir. 1955) (affirming "judgment" of dismissal under Section 2680(a) and (h)), cert. denied, 350 U.S. 975 (1956); *Goodwill Indus. of El Paso* v. *United States*, 218 F.2d 270, 271 (5th Cir. 1954) (affirming "judgment" dismissing claim under Section 2680(a)); *Panella* v. *United States*, 216 F.2d 622, 623, 626 (2d Cir. 1954) (reversing "[j]udgment" dismissing claim under Section 2680(h)); *Stepp* v. *United States*, 207 F.2d 909, 911-912 (4th Cir. 1953) (affirming "judgment" in favor of United States under Section 2680(h)), cert. denied, 347 U.S. 933 (1954); *Broadway Open Air Theatre* v. *United States*, 208 F.2d 257, 258-260 (4th Cir. 1953) (per curiam) (affirming "judgment" in favor of United States under Section 2680(c));

appropriate—use of "judgment" to describe the dismissal of an FTCA case under Section 2680 is direct evidence of the "ordinary, contemporary, common meaning" of that term. *Octane Fitness*, 134 S. Ct. at 1756 (citation omitted). Excluding Section 2680 judgments from the scope of the judgment bar conflicts with that ordinary meaning.

2. Rule 54(a) and neighboring provisions of the FTCA confirm that a Section 2680 dismissal is a "judgment"

Congress's understanding that the judgment bar's reference to "judgment" encompasses Section 2680 dismissals is reinforced by both (1) the Federal Rules of Civil Procedure, and (2) neighboring provisions of the FTCA. At the time Congress enacted the FTCA, Rule 54(a) defined "[j]udgment" as "includ[ing] a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a) (1946); see Fed. R. Civ. P. 54(a) (2015) (same). No one—then or now—doubts that "an appeal lies" from a district court's dismissal of an FTCA case under Section 2680. That understanding makes sense only if such a dismissal counts as a "judgment" under Rule 54(a).

Rule 54(a)'s definition of "judgment" is especially significant because the original FTCA expressly incorporated the Federal Rules of Civil Procedure. Specifically, Section 411 of the FTCA explicitly stated

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In re Texas City Disaster Litig., 197 F.2d 771, 781 (5th Cir. 1952), aff'd, *sub nom. Dalehite* v. *United States*, 346 U.S. 15 (1953) (rendering "judgment" for United States under Section 2680(a)); *Johnson* v. *United States*, 170 F.2d 767 (9th Cir. 1948) (reversing "[j]udgment" dismissing claim under Section 2680(j)); *Wilcox* v. *United States*, 117 F. Supp. 119, 124 (S.D.N.Y. 1953) (granting "summary judgment" to United States under Section 2680(h)).

that those rules would govern the "forms of process, writs, pleadings, and motions, and the practice and procedure" in FTCA cases. § 411, 60 Stat. 844; see App., *infra*, 12a-13a. Section 412 then set forth the specific mechanisms for appeals in FTCA cases. See § 412, 60 Stat. 844-845; App., *infra*, 13a-14a. That provision indicated that "[f]inal *judgments* in the district courts in [FTCA actions] shall be subject to review by appeal" either (1) in the circuit courts of appeals, or (2) in the Court of Claims. § 412(a), 60 Stat. 844-845 (emphasis added).

Sections 411 and 412 support the conclusion that Congress understood Section 2680 dismissals to qualify as "judgment[s]" throughout the FTCA—including for purposes of the judgment bar. Congress obviously wanted to allow claimants to appeal such dismissals. Yet Congress authorized such appeals only for "[f]inal judgments in the district courts." § 412(a), 60 Stat. 844. In doing so, it plainly understood the term "judgments" to encompass the dismissal of an FTCA claim under Section 2680. There is no reason Congress would have used the same term ("judgment" and "judgments") in neighboring FTCA provisions (Section 410(b)'s judgment bar and Section 412(a)'s appellate review provision) if it had understood those terms to have entirely different meanings. See, *e.g.*, *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014) ("Generally, identical words used in different parts of the same statute are presumed to have the same meaning.") (ellipses, citation, and internal quotation marks omitted).

B. The Purpose Of The Judgment Bar Confirms That A Section 2680 Dismissal Is A "Judgment"

The core purpose of the judgment bar—avoiding duplicative litigation and thereby alleviating the strain on government resources and employee morale—confirms that the ordinary meaning of the term "judgment" in Section 2676 should be given effect.

1. Congress enacted the FTCA in part to address the problem that "the Government, through the Department of Justice, [wa]s constantly being called on by the heads of the various agencies to go in and defend" federal employees from suit. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (quoting *1942 Hearing* 9).[7] Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend

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[7] Much of the relevant history of the FTCA "appears in the Seventy-seventh Congress, rather than in the Seventy-ninth Congress, which enacted it." *Gilman*, 347 U.S. at 511 n.2 (citing *Dalehite*, 346 U.S. at 24-30). As this Court's opinion in *Gilman* notes, *ibid.*, Assistant Attorney General Shea's remarks at the 1942 hearing were made in specific reference to the provision that became Section 2672 of the FTCA, which provides that an FTCA plaintiff's acceptance of an "award, compromise, or settlement" offered by the Attorney General "shall constitute a complete release of any claim * * * against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." 28 U.S.C. 2672. The Court recognized, however, the similarities between Sections 2672 and 2676, *Gilman*, 347 U.S. at 511 n.2, as did Assistant Attorney General Shea in his own comments, see *1942 Hearing* 27 ("Judgment in a tort action constitutes a bar to further action upon the same claim, not only against the Government (as would have been true under H.R. 5373) but also against the delinquent employee, for reasons already discussed in respect of administrative adjustments of claims up to $1,000.").

large damage suits." *Ibid.* The FTCA addressed that problem by allowing plaintiffs to sue the United States instead of the individual employee. The judgment bar then prevents the plaintiff from "turn[ing] around and su[ing]" the individual employee once the FTCA action has gone to judgment. *Ibid.*

As the legislative history shows, Congress was aware of the significant costs associated with subjecting government employees to the risks of going to trial. Those costs include the potential for "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted) (discussing policy interests underlying immunities of government officials from suit); see also *1942 Hearing* 9. The judgment bar reflects Congress's "concern[] about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees." *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).

This Court recognized those core purposes of the judgment bar in *Will* v. *Hallock*, 546 U.S. 345 (2006). There, the Court held that a district court's decision not to apply the judgment bar is not immediately appealable under the collateral order doctrine. *Id.* at 348-349. In doing so, it distinguished the judgment bar from the doctrine of qualified immunity. *Id.* at 354. The Court explained that whereas the main purpose of qualified immunity is to properly incentivize government employees to show initiative in situations where the relevant law is not certain, the judgment bar's main goal is "to save trouble for the Government and its employees" by avoiding repetitive lawsuits

based on the same alleged misconduct. *Id.* at 353-354. In particular, the Court noted that the judgment bar's core purpose is to "avoid[] duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties.'" *Id.* at 354-355 (quoting 18C *Federal Practice & Procedure* § 4402, at 9). The Court emphasized that the judgment bar operates to "respect[] a prior judgment by giving a defense against relitigation" based on the same underlying facts. *Id.* at 355.

2. Treating Section 2680 dismissals as "judgment[s]" for purposes of the judgment bar advances Congress's core objectives. A judgment in the government's favor on the basis of one of the Section 2680 exceptions frequently comes only "after extensive discovery and a trial." *Begay* v. *United States*, 768 F.2d 1059, 1060 (9th Cir. 1985) (affirming dismissal under Section 2680(a)'s discretionary-function exception). Litigation of those exceptions thus often consumes considerable time and energy on the part of the government and judiciary. To take one of the more extreme examples, this Court's decision in *Dalehite*, *supra*, held that the United States was not liable under Section 2680(a)—but only after the district court had already conducted a "trial on the merits" involving "hundreds of exhibits" and generating a transcript consisting of "nearly 20,000 pages." *In re Texas City Disaster Litig.*, 197 F.2d 771, 773 (5th Cir. 1952) (citation omitted); see *Dalehite*, 346 U.S. at 24-25. Other examples of burdensome and intrusive Section 2680 litigation abound.[8]

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[8] See, *e.g.*, *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandese*, 467 U.S. 797, 803-804, 821 (1984) (holding that United States was entitled to judgment under Section 2680 after full trial);

In re Katrina Canal Breaches Consol. Litig., 696 F.3d 436, 449-452 (5th Cir. 2012) (concluding, based on evidence presented in four-week bench trial, that Section 2680(a) bars claims), cert. denied, 133 S. Ct. 2855 (2013); *Kelly* v. *United States*, 241 F.3d 755, 757, 764 (9th Cir. 2001) (holding that United States was entitled to judgment of dismissal under Section 2680(a), after full trial); *Irving* v. *United States*, 162 F.3d 154, 158-159, 169 (1st Cir.) (en banc) (holding that United States was entitled to judgment under Section 2680(a), after nearly 20 years of litigation and three separate appeals), cert. denied, 528 U.S. 812 (1999); *Aragon* v. *United States*, 146 F.3d 819, 821 (10th Cir. 1998) ("After a four-day bench trial focusing on the discretionary function exception, the district court dismissed the case for lack of subject matter jurisdiction."); *Andrews* v. *United States*, 121 F.3d 1430, 1435 (11th Cir. 1997) (holding that United States was entitled to judgment of dismissal under Section 2680(a), after full trial); *Blackburn* v. *United States*, 100 F.3d 1426, 1435-1436 (9th Cir. 1996) (rejecting plaintiff's argument that "120 days of discovery" in which United States "produced thousands of pages of documents" was insufficient for purposes of litigating applicability of Section 2680(a)); *Allen* v. *United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (holding that Section 2680(a) applies and reversing district court's judgment against United States after extensive trial involving 98 witnesses, 1692 documentary exhibits, and 273-page district court opinion, see 588 F. Supp. 247 (D. Utah 1984)), cert. denied, 484 U.S. 1004 (1988); *Barnson* v. *United States*, 816 F.2d 549, 551 (10th Cir.) (noting "extensive discovery" before district court granted summary judgment to United States under Section 2680(a)), cert. denied, 484 U.S. 896 (1987); *Coffey* v. *United States*, 906 F. Supp. 2d 1114 (D.N.M. 2012) (adjudicating applicability of Section 2680(a) following two-day bench trial); *Villanueva* v. *United States*, 708 F. Supp. 2d 960 (D. Ariz. 2009) (entering judgment for United States based on Section 2680(a) after eight years of litigation involving multiple appeals to the Ninth Circuit and an appeal to this Court); *Limone* v. *United States*, 497 F. Supp. 2d 143, 202-204 (D. Mass. 2007) (rejecting applicability of Section 2680(a) and (h) based on trial evidence); *Loughlin* v. *United States*, 286 F. Supp. 2d 1, 9 (D.D.C. 2003) (noting "six months" of "extensive discovery" regarding applicability of Section 2680(a)); *Stewart* v.

The factual inquiry that courts have sometimes found necessary to determine the application of one of the exceptions in Section 2680 flows from the substantive character of that provision. For example, Section 2680(a)'s discretionary-function exception provides that the United States cannot be held liable under the FTCA on a claim arising out of the performance of "a discretionary function or duty" on the part of a federal employee or agency. Applying that exception requires courts to conduct an inquiry similar to the one used to determine whether a federal employee is entitled to common-law immunity from a state-law tort claim—a non-jurisdictional defense. In *Westfall* v. *Erwin*, 484 U.S. 292 (1988), the Court held that federal officials have immunity from state-law tort liability only if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Id.* at 300. As the Court recognized, that inquiry is "complex and often highly empirical." *Ibid.* The same is true in the context of the FTCA, where disputes over Section 2680(a) can often lead to a "quagmire of litigation." *Irving* v. *United States*, 532 F. Supp. 840, 844-845 (D.N.H. 1982) (citation and internal quotation marks omitted), vacated by 867 F.2d 606 (1988) (Tbl.); see generally note 8, *supra*.

In short, allowing FTCA plaintiffs to "turn around and sue" the individual employee once the plaintiff's FTCA claim has gone to judgment would impose "a very substantial burden" on the government to defend against the suit a second time. *1942 Hearing* 9. That

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United States, 486 F. Supp. 178, 182, 185 (C.D. Ill. 1980) (dismissing case under Section 2680(a) after "extensive discovery" and "numerous discovery disputes").

is the very burden that the judgment bar was intended to eliminate.

C. *Res Judicata* Principles Do Not Prevent Section 2680 Dismissals From Triggering The Judgment Bar

The court of appeals refused to apply the judgment bar here on the grounds that the bar is triggered only by a "judgment on the merits" under the common-law doctrine of *res judicata*. Pet. App. 6a, 9a. Respondent has advanced essentially the same argument in this Court. He asserts that (1) the judgment bar "must be understood, against the backdrop of *res judicata*, as referring to judgments capable of having some preclusive effect in the first place"; (2) the purpose of the judgment bar is to promote "symmetry" and "*expand* that preclusive effect to *non-parties*—not to grant such effect to judgments that *never* would have had preclusive force *even against the original litigants*," and (3) jurisdictional dismissals—including dismissals under Section 2680—"*never*" have preclusive force and thus do not count as "judgment[s]" for purposes of the judgment bar. Br. in Opp. 33-34; see also *id.* at 35 ("[D]ismissal for lack of subject-matter jurisdiction is not a 'judgment' entitled to preclusive effect.").

Those arguments lack merit. Although the judgment bar and *res judicata* serve similar purposes, see pp. 23-25, *supra*, the judgment bar does not expressly incorporate *res judicata* principles, and the term "judgment" has the same meaning in the *res judicata* context that it does in other legal settings.[9] In any

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[9] In *Will*, this Court recognized an analogy between the judgment bar and *res judicata* when considering the question (not at issue here) of whether to apply the collateral order doctrine to a

event, even if respondent were right that Congress used the term "judgment" to encompass judgments "capable of having some preclusive effect" (Br. in Opp. 33), a Section 2680 dismissal is entitled to such effect under the *res judicata* doctrines of claim preclusion and issue preclusion. As a result, such dismissals count as "judgment[s]"—and trigger the judgment bar—even under respondent's theory.

1. The ordinary meaning of the term "judgment" governs the use of that term in the context of res judicata

When Congress used the unadorned term "judgment" in the judgment bar, it did not intend to refer only to judgments "on the merits" (Pet. App. 6a) or "capable of having some preclusive effect" (Br. in Opp. 33). As explained above, the term "judgment" had a settled meaning—in ordinary speech and in common legal parlance—that encompassed all final adjudications of a case. See pp. 18-22, *supra*. Congress would not have referred to "the judgment" in an FTCA action if it had intended to refer only to a subset of judgments.

Respondent emphasizes this Court's longstanding view that "'the words of a statute must be read in their context,'" and he asserts that "[t]he context of [the judgment bar] is preclusion and *res judicata*." Br. in Opp. 32 (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). But it does not follow that Congress's reference to "judgment" neces-

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district court's decision not to apply the judgment bar. 546 U.S. at 354. In doing so, however, the Court noted that "the statutory judgment bar is arguably broader than traditional res judicata." *Ibid.*

sarily encompasses only judgments "capable of having some preclusive effect." *Id.* at 33. That term has never been understood—not even in the *res judicata* context—to refer only to judgments that are on the merits or that otherwise trigger preclusion.

At the time Congress enacted the FTCA, leading common-law authorities interpreted the term "judgment" to encompass the final decision in a case, whether or not that decision actually adjudicated the substance of the underlying cause of action. For example, the Restatement (First) of Judgments—which was completed in 1942, four years before Congress enacted the FTCA—expressly recognized that when a court rules for a defendant "based on the lack of jurisdiction of the court over the defendant or over the subject of the action," that decision nonetheless still constitutes a "judgment." *Id.* § 49 cmt. a, at 194. Moreover, at that time, this Court had repeatedly used the term "judgment" to describe the dismissal of a case for lack of jurisdiction.[10]

The leading scholarly treatise on judgments likewise made clear that the term "judgment" was understood to cover judicial decisions that did not resolve the merits of the underlying substantive claim at issue. See 1 Henry Campbell Black, *A Treatise on the*

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[10] See, *e.g.*, *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 699-700 (1927) (noting holding of *Shaffer* v. *Carter*, 252 U.S. 37, 44 (1920), that "a judgment of dismissal for lack of jurisdiction is a final judgment for purposes of appeal"); see *Great W. Ins. Co.* v. *United States*, 112 U.S. 193, 196 (1884) (explaining that when a court "is forbidden to entertain jurisdiction," then a "judgment of dismissal" is appropriate); cf. *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 291 (1947) (referring to this Court's "judgment declining jurisdiction" over appeal) (citation omitted).

Law of Judgments § 21, at 28 (1891). As that treatise explained, "[a] *judgment* of nonsuit or dismissal is final, though it does not reach the merits." *Ibid.* (emphasis added); see *id.* § 13, at 18 (stating that a judgment for the defendant on a legal issue raised by a demurrer "is a final judgment"); *id.* § 27, at 32 (stating that the "dismissal of * * * a suit at law * * * is a final judgment").

Nor is respondent right to suggest (Br. in Opp. 33) that Congress would have used the term "judgment"—without a modifier—to encompass only those final judgments "capable of having some preclusive effect." That is not how the Restatement (First) of Judgments used the term in its extended discussion of *res judicata*. The Restatement explained that some "judgment[s]" (*i.e.*, those "on the merits") have claim-preclusive effect,[11] whereas other "judgment[s]" (*i.e.*,

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[11] See, *e.g.*, Restatement (First) Judgments § 48, at 191 (stating general rule that "[w]here a valid and final personal judgment is rendered *on the merits* in favor of the defendant," plaintiff is barred from bringing subsequent suit based on same cause of action) (emphasis added); *id.* § 50, at 197 (where "judgment" is rendered for defendant because complaint is insufficient as matter of law, "*if the judgment is on the merits*" the plaintiff cannot bring subsequent suit based on same cause of action) (emphasis added); *id.* § 96(1)(a), at 472 (stating rule that "a valid judgment * * * for the defendant[-indemnitor] *on the merits* for reasons not personal to the defendant" terminates a cause of action against the indemnitee) (emphasis added); *id.* § 99, at 493 (noting that "[a] valid judgment *on the merits* and not based on a personal defense" in favor of the defendant "bars a subsequent action by the plaintiff against another responsible for the conduct of such person if the action is based solely upon the existence of a tort or breach of contract by such person") (emphasis added).

those "not on the merits") do not.[12] But—contrary to respondent's theory—the Restatement never suggested that the latter type of judgment somehow did not qualify as a "judgment." There is accordingly no textual or historical reason to believe that Congress used the broad term "judgment" to refer only to the subset of judgments with preclusive force.

2. A judgment of dismissal under Section 2680 has preclusive effect under the related doctrines of claim preclusion and issue preclusion

Even if respondent were right that the judgment bar applies only to judgments "capable of having some preclusive effect" (Br. in Opp. 33), it would still apply to judgments of dismissal under Section 2680. As this Court has explained, "[t]he preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008). Both branches of *res judicata* serve the important goals of "reliev[ing] parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). Both protect the United States from being sued on an FTCA claim that has already been subject to a judgment of dismissal

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[12] See, *e.g.*, Restatement (First) Judgments § 49, at 193 (noting that plaintiff is generally not precluded from bringing subsequent suit based on same cause of action where his prior suit resulted in a "valid and final personal judgment *not on the merits*") (emphasis added); *id.* § 49 cmt. a, at 194 (identifying a "judgment * * * based on the lack of [subject-matter] jurisdiction" as one that is "*not on the merits*") (emphasis added); see also *id.* § 51 cmt. b, at 202; *id.* § 52 cmt. g, at 205; *id.* § 59 & cmt. b, at 236-238.

under Section 2680. Because such judgments are thus "capable of having some preclusive effect" (Br. in Opp. 33), they qualify as "judgment[s]" even under respondent's interpretation of the judgment bar.

a. Under the doctrine of claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). For purposes of claim preclusion, a judgment "on the merits" is "one that actually 'pass[es] directly on the substance of [a particular] claim' before the court." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 501-502 (2001) (brackets in original) (quoting 1 Restatement (Second) of Judgments § 19 cmt. a, at 161 (1982)).[13] Moreover, a judgment is "on the merits" for claim-preclusion purposes if—even though the judgment "declin[es] to reach [the] ultimate substantive issues"—it is "based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation." *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947).

A judgment dismissing an FTCA case pursuant to Section 2680 triggers the doctrine of claim preclusion for two independent reasons. First, such a judgment

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[13] See Restatement (First) Judgments § 49 cmt. a, at 193 (noting that a judgment is "on the merits" when it is based "on rules of substantive law" and "determines that the plaintiff has no cause of action."); Jack H. Friedenthal et al., *Civil Procedure* § 14.7, at 652 (2d ed. 1993) ("In general terms, a judgment is considered to be on the merits if it is a disposition based on the validity of the plaintiff's claim rather than on a technical procedural ground.").

"passes directly on the substance" of the plaintiff's FTCA claim against the United States. *Semtek Int'l*, 531 U.S. at 501-502 (brackets and citation omitted). As explained above, Section 2674 establishes the substantive "Liability" of the United States for torts committed by government employees. See p. 4, *supra*. Section 2680 creates exceptions to that liability. See 28 U.S.C. 2680 (stating that "[t]he provisions of [Chapter 171]"—including Section 2674—"shall not apply to" the enumerated exceptions). A Section 2680 dismissal thus necessarily reflects the court's final and conclusive determination that the United States is not substantively liable to the plaintiff under the FTCA.

This Court has repeatedly emphasized that Section 2680 imposes "substantive limitations" on the United States' FTCA liability. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955). In *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013), for example, the Court stated that, "[s]ubstantively, [Section 2674 of] the FTCA makes the United States liable" to the same extent as private individuals under state law, "subject to enumerated exceptions to the immunity waiver, §§ 2680(a)-(n)." Similarly, this Court described Section 2680 as setting forth "various statutory exceptions to FTCA liability" in *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992). See also, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315 (1991); *Rayonier* v. *United States*, 352 U.S. 315, 318 (1957). As the Court explained in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandese*, 467 U.S. 797 (1984), Section 2680 marks "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id.* at 808.

Treating the Section 2680 exceptions as substantive also tracks the understanding of the FTCA's principal draftsman. As Department of Justice official Alexander Holtzoff explained, the claims identified in what eventually became Section 2680 constitute "exceptions to liability" designed "to protect the taxpayers." *Report on Proposed Federal Tort Claims Bill* 15-16 (1931) (*Holtzoff Report*).[14] It also makes sense in light of the extensive litigation that is often required to establish the applicability of a Section 2680 defense, as well as the similarity of certain Section 2680 exceptions to substantive common-law defenses to liability. See pp. 25-28, *supra*. Notably, respondent does not appear to dispute that a judgment of dismissal under Section 2680 reflects a substantive determination that the plaintiff's claim is invalid. See Br. in Opp. 36-37.

Second, apart from its inherently substantive character, a judgment of dismissal under Section 2680 also has claim-preclusive effect because it is "based * * * on * * * the inaccessibility of all the courts of the [United States] to [FTCA] litigation." *Angel*, 330 U.S. at 190. Such a judgment reflects Congress's determination that the United States is not liable to the plaintiff; plaintiff's FTCA claim would thus fail in any federal court within the United States. See, *e.g.*, *Frigard* v. *United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam) (noting that Section 2680(a) dismissal means

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[14] See *Holtzoff Report* 15-20 ("In order to protect the taxpayers in this connection, * * * it is proposed to safeguard the United States by enumerating certain exceptions to liability. * * * The following is a list of the proposed exceptions to liability: [continues to list and describe exceptions, most of which were ultimately incorporated in Section 2680]."); *Kosak*, 465 U.S. at 857 n.13 (relying on *Holtzoff Report*).

that "no other court has the power to hear the case, nor can the [plaintiffs] redraft their claims to avoid the exceptions to the FTCA"), cert. denied, 490 U.S. 1098 (1989). The judgment therefore triggers claim preclusion even though it does not directly address whether the federal employee actually committed the alleged tort. See *Angel*, 330 U.S. at 190 ("It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation.").

b. Respondent and the court of appeals deny that a Section 2680 dismissal can trigger claim preclusion. In particular, they cite the general rule that a dismissal for lack of subject-matter jurisdiction is not substantive, and thus not entitled to claim-preclusive effect. Pet. App. 6a-10a; Br. in Opp. 33-35; see 1 Restatement (Second) of Judgments § 20, at 170. But that rule reflects the ordinary circumstance in which a court's dismissal for lack of jurisdiction is entirely distinct from its consideration of the merits. As Justice Breyer has made clear, that rule does not apply in the rare situation in which the jurisdictional inquiry and the merits inquiry turn on the exact same legal issue, such that the court's determination of that issue simultaneously and necessarily resolves both. See *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-81 (1st Cir. 1985), cert. denied, 476 U.S. 1159 (1986); see 18A *Federal Practice & Procedure* § 4441 n.30, at 234 (endorsing Justice Breyer's analysis). That is the case here, where the court's determination that a claim falls into one of the Section 2680 exceptions means that both (1) the court lacks jurisdiction, and (2) the United States is not substantively liable for the alleged tort.

Granting such dual-purpose determinations claim-preclusive effect is consistent with *res judicata*'s broad goal of avoiding duplicative litigation, conserving judicial resources, and encouraging reliance on prior decisions. *Allen*, 449 U.S. at 94; see pp. 23-25, *supra*. It also reflects the basic rule that claim preclusion applies when a court necessarily "determines that the plaintiff has no cause of action." Restatement (First) Judgments § 49 cmt. a, at 193. By contrast, the exception to claim preclusion for judgments based on lack of jurisdiction is premised on the assumption that jurisdictional dismissals usually involve "technical" or "procedural" defects that may be "cured" in a subsequent action. *Rose*, 778 F.2d at 79 (Breyer, J.).[15] Such a defect is *not* curable, however, when it also defeats the plaintiff's substantive claim on the merits. In such circumstances, the policy interest underlying the jurisdictional exception to claim preclusion does not apply, and there is no reason to permit the plaintiff to bring the same claim a second time.

Courts have often recognized the claim-preclusive effect of a judgment that—although technically based on lack of jurisdiction—nonetheless necessarily embodies a conclusion that the plaintiff lacks a valid cause of action on the merits. Some have done so in the exact context at issue here, concluding that a Sec-

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[15] See *Rose*, 778 F.2d at 79-80 (explaining that "jurisdictional" exception applies to cases dismissed based on "defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again"); see generally, *e.g.*, *Civil Procedure* § 14.7, at 652 ("In general terms, a judgment is considered to be on the merits if it is a disposition based on the validity of the plaintiff's claim rather than on a technical procedural ground.").

tion 2680 dismissal reflects a substantive conclusion that the plaintiff cannot prevail on his FTCA claim.[16] Courts also regularly designate Section 2680 dismissals as being "with prejudice"—a label reflecting their conclusive and preclusive nature.[17]

Other courts have similarly concluded that the dismissal of a claim based on state sovereign immunity—a defense that establishes the court's lack of jurisdiction—also triggers claim preclusion.[18] And in *Rose*, the First Circuit held that the dismissal of a

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[16] See, *e.g.*, *Jones* v. *United States*, 228 F.2d 52, 53 (D.C. Cir. 1955) (per curiam); *Bloomquist* v. *Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995); *Wohlford* v. *United States*, 823 F. Supp. 386, 389 (W.D. Va. 1992).

[17] See, *e.g.*, *Steele* v. *Federal Bureau of Prisons*, 355 F.3d 1204, 1213-1214 (10th Cir. 2003) (affirming dismissal with prejudice under Section 2680), cert. denied, 543 U.S. 925 (2004); *Anderson* v. *United States*, 317 F.3d 1235, 1236, 1240 (11th Cir.) (per curiam) (same), cert. denied, 540 U.S. 965 (2003); *Singleton* v. *United States*, 277 F.3d 864, 869 (6th Cir. 2002) (same), overruled on other grounds by *Hawver* v. *United States*, No. 14-1501, 2015 WL 9245249 (6th Cir. Dec. 17, 2015); *Saunders* v. *Bush*, 15 F.3d 64, 66 (5th Cir.) (same), cert. denied, 512 U.S. 1207 (1994); *Frigard*, 862 F.2d at 204 (same); *Midwest Knitting Mills, Inc.* v. *United States*, 741 F. Supp. 1345, 1352 (E.D. Wis. 1990) (dismissing with prejudice), aff'd, 950 F.2d 1295 (7th Cir. 1991); but see, *e.g.*, *Hart* v. *United States*, 630 F.3d 1085, 1091 (8th Cir. 2011) (modifying dismissal to be without prejudice).

[18] See, *e.g.*, *Flores* v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984) ("A summary judgment on grounds of sovereign immunity is," under Texas law, "a judgment on the merits for purposes of res judicata."); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984) ("In Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion."); *Herring* v. *Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 656 S.E.2d 307, 311 (N.C. Ct. App. 2008).

case based on the expiration of a jurisdictional statute of limitations nonetheless had claim-preclusive effect because the statutory time limit extinguished the plaintiff's "underlying substantive 'right.'" 778 F.2d at 79-81 (Breyer, J.). These various lines of decision are generally consistent with this Court's recognition that "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [i]s bound to apply," "the limitation is essentially substantive." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 695 n.15 (2004).

c. Apart from claim preclusion, a Section 2680 judgment of dismissal is also "capable of having some preclusive effect" (Br. in Opp. 33) under the issue-preclusion branch of *res judicata*. The general rule of issue preclusion is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302-1303 (2015) (brackets in original) (quoting 1 Restatement (Second) of Judgments § 27, at 250). "It has long been the rule" that issue preclusion "appl[ies] to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).[19]

Under issue preclusion, a judgment of dismissal under Section 2680—regardless of whether it is con-

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[19] See 1 Restatement (Second) of Judgments § 12 cmt. c, at 119; *id.* § 20 cmt. b, at 171; Restatement (First) of Judgments § 49 cmt. b, at 195; 18 *Federal Practice & Procedure* § 4418, at 467-469.

sidered jurisdictional, substantive, or both—has preclusive effect in any subsequent FTCA litigation between the plaintiff and the United States. If a plaintiff whose initial FTCA action was dismissed under Section 2680 files a subsequent FTCA action based on that same claim, it can be dismissed based on the preclusive effect of the first judgment. The court's determination that a particular claim falls within Section 2680 is conclusive and final, and it forecloses the plaintiff from relitigating the applicability of Section 2680. In this context, there is no meaningful distinction between issue preclusion and claim preclusion: Both doctrines bar the plaintiff from litigating his or her FTCA case a second time. Respondent is thus wrong to assert (Br. in Opp. 33-34) that an FTCA "dismissal for lack of jurisdiction would not even preclude the plaintiff from suing the [United States] on a claim arising from the same events" and that such a judgment "*never* would have * * * preclusive force *even against the original litigants*."

d. Respondent's overarching theory is that the core purpose of the judgment bar is to "ensure symmetry in *res judicata* treatment of tort claims against the Government and its employees" by "expand[ing] th[e] preclusive effect" of an FTCA judgment—which would otherwise only protect the United States—to the employee accused of committing the tort. Br. in Opp. 33 (emphasis omitted). But as discussed above, both claim preclusion and issue preclusion insulate the United States from any attempt by the plaintiff to relitigate an FTCA claim that has previously been dismissed under Section 2680. If respondent is correct that the judgment bar extends that same "preclusive effect" (*ibid.*) to the employee, then the "sym-

metry" that respondent invokes requires that the employee must likewise be completely insulated from suit.

Thus even if *res judicata* principles are relevant to the judgment bar, they only confirm its applicability to Section 2680 dismissals such as the one at issue in this case. Whether viewed in light of *res judicata* or otherwise, any such dismissal qualifies as a "judgment" and bars a subsequent claim against the employee.

D. Respondent's *Bivens* Claim Would Be Dismissed Even Under The Ninth Circuit's Narrower Construction of the Judgment Bar

Echoing some of respondent's policy concerns about the potential breadth of the judgment bar (see Br. in Opp. 39), the Ninth Circuit has adopted a narrower reading that would extend the judgment bar to some, but not all, FTCA judgments.[20] That approach does not help respondent here, however, because even the Ninth Circuit correctly treats Section 2680 dismissals as "judgment[s]" that trigger the judgment bar.

The key Ninth Circuit decision is *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008). There, the Ninth Circuit distinguished between a dismissal based on a substantive provision that limits the FTCA liability of the United States in all courts and a dismissal based on a procedural or technical defect that would permit the FTCA action to be refiled. The Ninth Circuit held

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[20] See *Pesnell* v. *Arsenault*, 543 F.3d 1038, 1042 (9th Cir. 2008); *id.* at 1046 (Clifton, J., concurring); see also *Hallock* v. *Bonner*, 387 F.3d 147, 156 (2d Cir. 2004) (Marrero, J., concurring) (advocating approach similar to Ninth Circuit), vacated by *sub nom. Will* v. *Hallock*, 546 U.S. 345 (2006).

that the judgment bar covers FTCA judgments that reflect a decision by Congress to "explicitly carve[] out an exception to its waiver of sovereign immunity," and thus to "flatly reject[] liability" for a category of claims. *Id.* at 1046 (Clifton, J., concurring); see *id.* at 1042 (opinion for court endorsing Judge Clifton's analysis). The court in *Pesnell* held that a judgment based on one of the Section 2680 exceptions falls squarely within that category. *Id.* at 1046.

The Ninth Circuit distinguished such substantive FTCA judgments from those based on curable procedural defects, which would include non-substantive dismissals for improper venue, failure to exhaust administrative remedies, and the like. *Pesnell*, 543 F.3d at 1046 (Clifton, J., concurring). The court explained that such procedural dismissals reflect Congress's decision to "accept[] possible liability," but to "channel[] the claims in a specific way." *Ibid.* A dismissal on those grounds, the court suggested, would not trigger the judgment bar. *Ibid.*

Like respondent's theory, the Ninth Circuit's effort to distinguish between different types of judgments has no basis in the text of the judgment bar. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). That said, the Ninth Circuit's approach has advantages that respondent's broader appeal to *res judicata* principles lacks. For one thing, that approach establishes a clear rule that is easy to apply and does not turn on the complexities of the *res judicata* doctrine. For another, it is largely faithful to the judgment bar's core goal of avoiding duplicative litigation. See *Pesnell*, 543

F.3d at 1046 (Clifton, J., concurring). When a plaintiff's FTCA claim is dismissed based on Congress's substantive decision to "flatly reject[] liability" for a category of claims, *ibid.*, that plaintiff cannot bring the same suit against the United States a second time. In those circumstances, the judgment bar serves the goal of avoiding repeat litigation by foreclosing any suit based on the same underlying facts against the individual federal employee. By contrast, a procedural dismissal based on a curable procedural defect essentially puts the plaintiff back in the position that he or she was in before filing suit in the first place. Because the plaintiff is free to re-assert his FTCA claim against the United States, such dismissals may not overly intrude on Congress's desire to prohibit duplicative litigation.

This case does not require the Court to assess the Ninth Circuit's approach or consider whether the judgment bar is triggered by dismissals on purely technical or procedural grounds. Respondent's FTCA action was dismissed based on Section 2680, which—as the Ninth Circuit held—is not a curable defect. Even under the alternative approach set forth in *Pesnell*, therefore, the judgment bar applies, and respondent's *Bivens* claim may not proceed.

II. RESPONDENT'S NEW ARGUMENTS AGAINST APPLYING THE JUDGMENT BAR LACK MERIT

In opposing certiorari, respondent advanced two new arguments that he failed to raise below and that the court of appeals never addressed. Specifically, respondent argued that (1) when an FTCA case is dismissed under Section 2680, it does not qualify as "an action under section 1346(b)" for purposes of the judgment bar, 28 U.S.C. 2676; and (2) in any event,

Section 2680 itself contains language establishing that the judgment bar does not apply to claims falling within its exceptions. See Br. in Opp. 24-25, 28-31, 34. Those arguments are at odds with the text of the FTCA and this Court's settled precedent.[21]

A. Respondent's FTCA Action Was "An Action Under Section 1346(b)"

By its terms, the judgment bar applies to any judgment in "an action under section 1346(b)." 28 U.S.C. 2676. Respondent does not—and cannot—dispute that he filed his prior suit "under" Section 1346(b), which is the sole basis for a district court's jurisdiction over an FTCA action. Respondent made clear throughout that case that his tort claim was "filed under the [FTCA]." J.A. 123 (response to motion to dismiss); see J.A. 91 (complaint, styled as an appeal of the denial of respondent's administrative tort claim under the FTCA). The district court noted that respondent sought relief "under the * * * FTCA" and stated that "[t]here is no dispute that [respondent's] claim falls under the FTCA." Pet. App. 48a. And the court of appeals likewise acknowledged that respondent filed his action "pursuant to the [FTCA]" and "under the FTCA." *Id.* at 62a-63a.

Respondent now argues that when an FTCA action is dismissed for lack of jurisdiction under Section 2680, that action does not qualify as "an action under section 1346(b)" for purposes of the judgment bar.

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[21] Although a respondent is entitled to raise new arguments in defense of the judgment, this Court "ordinarily do[es] not review claims made for the first time in this Court." *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (exercising discretion and declining to address new argument).

Br. in Opp. 34. In respondent's view, a district court's determination that it lacks jurisdiction to adjudicate an FTCA case means that the case was not brought "under" the FTCA in the first place. *Ibid.* That interpretation is at odds with the judgment bar's text and this Court's interpretation of nearly-identical language in 28 U.S.C. 2679.

1. As enacted by Congress, the judgment bar applies to the judgment in any "action under section 1346(b)." 28 U.S.C. 2676. That phrase encompasses any action invoking Section 1346(b) as the basis of a court's jurisdiction. As respondent appears to acknowledge, his theory requires revising the judgment bar to make it apply to any action "*properly* brought *under*" the FTCA. Br. in Opp. 34 (citation omitted). But there is no justification for departing from the words Congress chose. As this Court has emphasized, courts "are not at liberty to rewrite [a] statute to reflect a meaning [they] deem more desirable"; rather, they "must give effect to the text Congress enacted." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 228 (2008).

2. Respondent's interpretation of the phrase "action under section 1346(b)" also contradicts this Court's interpretation of virtually identical language in 28 U.S.C. 2679(a). In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), this Court held that Section 2679(a)'s phrase "cognizable under section 1346(b)" encompasses all tort claims that satisfy the express terms of Section 1346(b), regardless of whether other FTCA provisions foreclose relief. *Id.* at 477 & n.5. The Court's analysis in that case forecloses respondent's interpretation of the judgment bar here.

Section 2679(a) is one of the FTCA's exclusive-remedy provisions. It makes the FTCA the exclusive avenue for tort claims against the government, even against agencies that may otherwise "sue and be sued" in their own names. See *Meyer*, 510 U.S. at 476. Specifically, Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)* of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a) (emphasis added).

In *Meyer*, this Court stated that a claim is "cognizable under section 1346(b)" if it is within the category of claims defined by Section 1346(b), which includes

> claims that are * * * "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

510 U.S. at 477 (brackets in original) (quoting 28 U.S.C. 1346(b)(1)). The Court explained that a claim "comes within this jurisdictional grant—and thus is 'cognizable' under [Section] 1346(b)—if it is actionable under [Section] 1346(b). And a claim is actionable under [Section] 1346(b) if it alleges the six elements

outlined above." *Ibid.* Indeed, the Court emphasized that "[t]he question is not whether a claim is cognizable *under the FTCA* generally * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. *Id.* at 477 n.5 (quoting 28 U.S.C. 2679(a)).

Applying *Meyer*, several courts of appeals have recognized that a claim is "cognizable under section 1346(b)" for purposes of Section 2679(a)—and thus precludes suit against the agency directly—so long as it asserts a tort claim against the United States premised upon state law, even if that claim is ultimately barred by one of the exceptions set forth in Section 2680.[22]

Respondent makes no effort to reconcile his construction of the judgment bar's phrase "action under section 1346" with *Meyer*'s construction of Section 2679(a)'s phrase "cognizable under section 1346(b)." Nor is there any apparent justification for treating the two phrases so differently. To the contrary, *Meyer* specifically equated the phrase "cognizable under section 1346(b)" with the phrase "actionable under [Section] 1346(b)," 510 U.S. at 477, which is virtually indistinguishable from the judgment bar's phrase "action under section 1346(b)." 28 U.S.C. 2676. But if *Meyer* is right that a claim that "alleges the six elements outlined above" is "actionable under [Section] 1346(b)," 510 U.S. at 477, then a complaint that alleges those six elements and rests on Section 1346(b) as the

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[22] See *Burrows* v. *United States*, 120 Fed. Appx. 448, 449-450 (4th Cir. 2005) (per curiam); *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Me. Corp.* v. *United States Postal Serv.*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999).

basis for jurisdiction—as respondent's FTCA complaint did—is an "action under section 1346(b)," 28 U.S.C. 2676.

3. Respondent's interpretation of the judgment bar also runs afoul of this Court's interpretation of the FTCA's other exclusive-remedy provision, 28 U.S.C. 2679(b). Adopted as part of the Westfall Act, Section 2679(b) states that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title" is exclusive and bars a claim against the employee whose conduct is at issue. 28 U.S.C. 2679(b)(1); see 28 U.S.C. 2679(b)(2) (recognizing exception to this rule for *Bivens* and certain statutory actions). In *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected a construction of Section 2679(b)'s phrase "remedy * * * provided by sections 1346(b) and 2672" that is nearly identical to the reading of the judgment bar's phrase "under section 1346(b)" that respondent urges here. *Id.* at 165-175.

In *Smith*, the Ninth Circuit had held that Section 2679(b)'s exclusive-remedy provision could foreclose a suit against the federal employee in his individual capacity only if the FTCA would in fact provide the plaintiff a remedy once the United States was substituted as the defendant. See *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (9th Cir. 1989); 28 U.S.C. 2679(d) (establishing substitution mechanism). Because the FTCA's foreign country exception, 28 U.S.C. 2680(k), would have precluded recovery against the United States in an action under Section 1346(b), the Ninth Circuit held that Section 1346(b) did not provide the plaintiff a remedy against the United States and thus that Section 2679(b) did not bar the plaintiff from suing the employee directly. *Smith*, 885 F.2d at 655.

This Court reversed. The Court held that Section 2679(b) bars suit against an individual employee even if—as a result of one of Section 2680's exceptions—"the FTCA itself does not provide a means of recovery." *Smith*, 499 U.S. at 166. The Court supported its construction of Section 2679(b) by referring to Section 2679(d). That section provides that, if a tort suit is brought against a federal employee who was acting within the scope of his employment, the United States is to be substituted as the defendant, see 28 U.S.C. 2679(d)(1), (2) and (3), and the suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) * * * and shall be subject to the limitations and exceptions applicable to those actions," 28 U.S.C. 2679(d)(4). The Court reasoned that the "limitations and exceptions" language in Section 2679(d)(4) encompasses the Section 2680 "exceptions" and shows that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166. In other words, Section 2679(b)(1)'s phrase "remedy * * * provided by section[] 1346(b)" encompasses FTCA actions subject to dismissal under Section 2680.

Respondent's interpretation of the judgment bar cannot be reconciled with *Smith's* construction of Section 2679(b)(1) and (d)(4). The operative text of the provisions is parallel, and there is no basis for interpreting them so differently. Just as the phrase "[t]he remedy * * * provided by section[] 1346(b)" in Section 2679(b)(1) and the phrase "action against the United States filed pursuant to section 1346(b)" in

Section 2679(d)(4) include cases in which a claim brought under Section 1346(b) is ultimately precluded by Section 2680, so too does the judgment bar's phrase "an action under section 1346(b)" include cases brought under Section 1346(b) that are later determined to be foreclosed under Section 2680. *Smith* forecloses respondent's effort to limit the reach of the judgment bar in this fashion.

B. Section 2680 Does Not Exempt Categories Of FTCA Cases From The Judgment Bar

Respondent also argues (Br. in Opp. 28-31) that the "plain text" and "simple words" of Section 2680 itself exempt Section 2680 dismissals from the scope of the judgment bar. That contention relies upon Section 2680's introductory language stating that "[t]he provisions of this chapter"—*i.e.*, Chapter 171 of Title 28 of the United States Code—"shall not apply to" any of the types of claims expressly identified in Section 2680(a)-(n). 28 U.S.C. 2680. Respondent reasons (Br. in Opp. 28) that because the FTCA judgment bar is one of the "provisions of this chapter," that bar does not apply to FTCA claims dismissed under Section 2680. He is mistaken.

1. As explained above, *Smith* expressly held that Section 2679(b) applies to claims that fall within the enumerated exceptions to FTCA liability set forth in 28 U.S.C. 2680. *Smith*, 499 U.S. at 161-162, 165-167. But Section 2679 appears in Chapter 171 of Title 28, just like the judgment bar. *Smith*'s holding is thus incompatible with respondent's argument that Section 2680 renders the enumerated claims exempt from all of "[t]he provisions of this chapter."

2. To square his interpretation of Section 2680 with *Smith*, respondent invokes the FTCA's history. He

points out (Br. in Opp. 30) that Section 2679(b) was enacted as part of the Westfall Act in 1988, and he argues that it should therefore not be considered one of "[t]he provisions of this chapter" referred to in Section 2680. Instead, respondent appears to suggest (*id.* at 31) that the only "provisions of this chapter" that count for purposes of Section 2680 are those that were "part of the FTCA as originally enacted." His argument—which began as an effort to implement Section 2680's "simple words" (*id.* at 29)—thus ends up rewriting the statutory phrase "[t]he provisions of this chapter" to mean "[t]he provisions of this chapter, *but only insofar as they appeared in the original FTCA*." That contention fails as a textual matter, and it also contravenes the principle that statutory provisions should be interpreted as a coherent whole, even when they have been enacted at different times. See, *e.g.*, *Bilski* v. *Kappos*, 561 U.S. 593, 607-608 (2010).

Respondent's argument also fails on its own terms. The FTCA was originally enacted as Title IV of the Legislative Reorganization Act of 1946. See ch. 753, 60 Stat. 812-814, 842-847. What is now Section 2680 appeared in Section 421 of that Act, and the introductory language that respondent now relies upon stated that "[t]he provisions *of this title* shall not apply to [the specifically enumerated exceptions]." § 421, 60 Stat. 845-846 (emphasis added); see App., *infra*, 14a. Crucially, Section 421's reference to "this title" encompassed the FTCA in its entirety. Respondent's analysis of Section 2680 can thus be correct only if Congress intended to exempt the types of claims enumerated in that provision from all other provisions of the original FTCA.

That is not a plausible understanding of Congress's intent. Other FTCA provisions defined key statutory terms, mandated that the Federal Rules of Civil Procedure govern FTCA cases, and authorized litigants to appeal unfavorable FTCA decisions to either the circuit courts of appeals or the Court of Claims. See §§ 402, 411, 412, 60 Stat. 842-845; App., *infra*, 10a-14a. There is no reason to believe that Congress would have rendered those provisions inapplicable to FTCA cases involving claims falling within Section 2680's enumerated exceptions.

The legislative history also makes clear that Section 423 of the original FTCA—the precursor to Section 2679(a)—was understood to apply in cases involving the types of claims exempted from the FTCA under what is now Section 2680. See § 423, 60 Stat. 846; App., *infra*, 16a. In 1942, Assistant Attorney General Francis Shea provided Congress with a written analysis of the provision that eventually became Section 423. *1942 Hearing* 29. His analysis expressly stated that that provision would apply even with respect to claims falling under "the exceptions of the act [*i.e.*, the Section 2680 exceptions]." *Ibid.*

Respondent is therefore mistaken to believe that either Section 2680 or its predecessor in the original FTCA was ever understood to exempt the identified claims from all of the FTCA's other provisions. The better reading of Section 2680—and the only reading consistent with *Smith*—is that Section 2680's introductory "shall not apply" language both exempts the enumerated categories of tort claims from the FTCA's waiver of sovereign immunity and imposes substantive restrictions on the tort liability of the United States. But Section 2680 does not exempt those categories of

claims from other FTCA provisions—such as Section 2679(b) or the judgment bar—that expressly limit the remedies that tort claimants may pursue outside of the FTCA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346(b) provides:

United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

2. 28 U.S.C. 2674 provides:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual

under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

3. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

4. 28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject

matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therin to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the

incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under

the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provision of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

5. 28 U.S.C. 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an action or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this

chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of quarantine by the United States.

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[1] So in original

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

6. Federal Tort Claims Act, ch. 753, Tit. IV, 60 Stat. 842 provides in pertinent part:

* * * * *

DEFINITIONS

SEC. 402. As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

* * * * *

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United

States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

PROCEDURE

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act

of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

REVIEW

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

(b) Sections 239 and 240 of the Judicial Code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

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EXCEPTIONS

SEC. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46,

secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

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EXCLUSIVENESS OF REMEDY

SEC. 423. From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under part 3 of this title, and the remedies provided by this title in such cases shall be exclusive.

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